IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD JOHNSTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 09-1681
	)	
	)	Magistrate Judge Bissoon
CHIEF EXEC. DAN ONORATO, *et al*.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Ronald Johnston is a state prisoner currently incarcerated in the State Correctional Institution at Pittsburgh, Pennsylvania, who asserts that his constitutional rights were violated while he was a pre-trial detainee at the Allegheny County Jail ("Jail"). The Court dismissed the Complaint and denied Plaintiff's Motion to Amend on February 22, 2010 (Doc. 22). Plaintiff has filed a "Motion for Leave to Amend to Overcome the Deficiency" (Doc. 24) citing Federal Rule of Civil Procedure 59(e), which permits a Court to "correct manifest errors of law or fact" or to consider "newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906 (3d Cir. 1985).

Claims against all Defendants except Defendant Usner were dismissed on the basis that they are barred by the statute of limitations. Plaintiff asserts that the Court should permit him to amend his Complaint to include allegations that Defendants' interference with his state court child custody case continued through January, 2008. While such an amendment would make Plaintiff's denial of access to the courts claim timely, the amendment would be futile because a state court custody dispute is not the proper subject of a denial of access claim. "Under the First

and Fourteenth Amendments, prisoners retain a right of access to the courts. However, **prisoners may only proceed on access-to-courts claims in two types of cases, challenges (direct or collateral) to their sentences and conditions of confinement.**" Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2008) (emphasis added), citing Lewis v. Casey, 518 U.S. 343, 354 (1996).

Plaintiff also challenges the Court's ruling dismissing his malicious prosecution claim against Defendant Usner. The Court ruled that Plaintiff's imprisonment on other charges when Defendant Usner initiated the prosecution for escape prevented Plaintiff from establishing a deprivation of liberty as is required for a malicious prosecution claim. Camiolo v. State Farm Fire and Cas. Co., 334 F.3d 345, 362-63 (3d Cir. 2003) (deprivation of liberty is an element of malicious prosecution claim). Plaintiff asserts that the Court made a mistake of fact in this respect because he was a pretrial detainee at the time charges were filed, and that "nothing was preventing [him] from posting bond" (Doc. 24, p. 2). Plaintiff alleges that the $25,000 bond set for his new charges "prevented him from posting bond on his original charge" (Id., p. 9). An exhibit attached to Plaintiff's Motion establishes that he was being held in the Jail on a robbery charge and that bond had been set at $100,000 "straight" at the time Defendant Usner filed the escape charges at issue in this case (Doc. 24, Ex. 1, p. 3). Therefore, the Court did not err in ruling that Plaintiff was not denied his liberty when new charges were filed because Plaintiff was admittedly already in jail on other charges. See Henderson v. McGinnis, 1996 WL 417556, *10 (N.D. Ill., July 22, 1996) ("A prisoner in custody when a criminal action is commenced against him cannot bring a malicious prosecution claim because the filing of criminal charges did not deprive him of liberty. If he is ultimately convicted and receives an additional sentence, he has suffered a loss of liberty, but in that case the proceedings would not have been terminated in his

favor."); Goncalves v. Reynolds, 198 F.Supp.2d 278, 283 (W.D. N.Y. 2001) (rejecting claim that new charge "demolished" chance for bail on existing charges).

Finally, even if Plaintiff's allegations sufficed to establish a deprivation of liberty, his malicious prosecution claim fails because he has not alleged a "facially plausible" claim that Defendant Usner lacked probable cause to believe Plaintiff had attempted an escape. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face" to avoid dismissal). Probable cause exists "when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." Orsatti v. New Jersey State Police, 71 F.3d 480, 483 (3d Cir. 1995). Probable cause "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." Wright v. City of Phila., 409 F.3d 595, 602 (3d Cir. 2005). And, of particular relevance here, "it is irrelevant to the probable cause analysis . . . whether a person is later acquitted of the crime for which she or he was arrested." Id.

Here, Plaintiff does not contest that the window in his jail cell had been tampered with (in fact, he states that it had been "cut"), nor does he contest that instruments sufficient to accomplish such tampering were found in an area near his cell along with a "makeshift" rope. Plaintiff's complaint with the charges filed against him is that "there was no probable cause to suspect that Plaintiff was guilty of cutting the window in his cell" because he "was one of thousands of inmates assigned to that cell throughout the history of that cell." (Doc. 24, p. 6) Indeed, Plaintiff's defense ultimately succeeded. In this case, however, a reasonable person faced with evidence that a jail cell window had been tampered with, and that tools for

accomplishing this were nearby, would believe that the occupant of the cell was responsible for these actions, and that he took these actions in an attempt to escape. Therefore, Plaintiff has not made a plausible allegation that Defendant Usner lacked probable cause in this case.[1]

AND NOW, this 11th day of March, 2010,

IT IS HEREBY ORDERED that Defendants' "Motion for Leave to Amend to Overcome the Deficiency (Doc. 24) is DENIED

s/Cathy Bissoon
CATHY BISSOON
UNITED STATE MAGISTRATE JUDGE

Cc:
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[1] Plaintiff's allegation that Defendants "fabricated evidence" would be relevant to this inquiry if it were based upon more than his assertion that one Defendant placed the length of the makeshift rope at 30 feet while another said it was 50 feet long. This difference of opinion concerning the length of the makeshift rope is not an indication that any Defendant "fabricated" evidence.